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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAIME CERPA, Defendant and Appellant.	F073493 (Super. Ct. No. 1432625) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, Amanda D. Cary, Tami M. Krenzin, Christina Simpson and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Jaime Cerpa and three codefendants guilty of the first degree murder of Julio Jimenez (Pen. Code,[1] § 187, subd. (a); count 1); robbery of an inhabited dwelling (§ 212.5, subd. (a); count 2) and robbery of Corina Vargas (§ 211; count 3).[2] As to each defendant, it was found true that the murder was committed during the course of a robbery and that all defendants were principals in the robbery (§ 189); that the robberies were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); and that a principal in the robberies (Domingo Becerra) personally discharged a firearm causing the death of Jimenez (§§ 12022.7, 12022.53, subds. (d), (e)(1)). The trial court sentenced Cerpa to a total term of 80 years to life, consisting of 75 years to life for the murder and firearm enhancements, plus a total of five years for the robberies. Various fines and fees were imposed.

Cerpa raises numerous claims attacking the validity of his convictions: insufficient corroboration of accomplice testimony, various instructional errors, prosecutorial misconduct, prejudicial admission of hearsay, ineffective assistance of counsel, error in the verdict forms, and cumulative error. In supplemental briefing, Cerpa argues, based on the recent amendment to Senate Bill No. 620 (Senate Bill 620), that this matter must be remanded so that the trial court may consider whether to exercise its discretion to strike or dismiss one or more of the firearm enhancements pursuant to section 12022.53, subdivision (h). In additional supplement briefing, Cerpa contends he can avail himself of the ameliorative benefits of very recent Senate Bill No. 1437 (Senate Bill 1437), which changes the law on what mental state is required to be guilty of murder. We agree only

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 Codefendants Angel Delvillar, Phillip Lopez, Jr., and Hector Joaquin Rocha, Jr. filed a separate appeal (case No. F069224); Delvillar and Rocha's convictions were affirmed; Lopez's conviction was conditionally reversed and the case remanded to the juvenile court for further proceedings and for the purpose of making a determination in light of *People v. Franklin* (2016) 63 Cal.4th 261.

that this case must be remanded for resentencing in light of Senate Bill 620, but in all other respects, affirm.

STATEMENT OF THE FACTS

This case involves a March 24, 2010, home invasion robbery that resulted in the shooting death of Julio Jimenez. The perpetrators of the robbery were Norteño gang members Domingo Becerra, Aquiles Virgen, Daniel Flores (who each plead guilty before trial and testified for the prosecution) and codefendants Rocha, Lopez, and Delvillar. Becerra was the perpetrator of the murder. Cerpa, known as "Joker," was not at the scene of the crime and was prosecuted as an aider and abettor.[3] The prosecution alleged Cerpa was a high-ranking gang member who participated in the planning of the robbery from his home in Keyes, and aided in the robbery by supplying the perpetrators with ammunition and masks.

Testimony of Percipient Witnesses to the Crimes

On March 24, 2010, after midnight, Isaias Pantoja and his two-year-old daughter were asleep on a bed in the living room of their home on Thrasher Avenue. Pantoja had rented the house only three weeks earlier and did not know who lived there before he moved in. Pantoja was not a drug dealer, and no one had come by asking to buy drugs. When he heard voices, shouting as if they were fighting or struggling, Pantoja got up and looked out the window and saw five or six people wearing blue and black clothing, their faces covered with handkerchiefs or towels. Four or five of them were carrying weapons—pistols and a rifle—and a strange SUV or truck was parked in the driveway. Three other people were being led to the backyard, including a man who was being dragged and hit or pushed. Pantoja called 911 on his cell phone.

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[3] Throughout the case, the various gang members were referred to alternately by name or by gang moniker. Aside from Cerpa, who we at times refer to as Joker when relevant, we refer to the remainder by name only to avoid confusion.

While on the phone, Pantoja heard the kitchen window and several other windows in the back of the house break. His daughter was still asleep. Three people came into the kitchen through the window. Pantoja was trying to hold them back while on the phone giving police directions. Pantoja was asking for someone who spoke Spanish when he heard a gunshot. Later, Pantoja saw a bullet hole in the kitchen ceiling. Pantoja saw two guns inside the house. He heard two gunshots—one outside and one inside the house.

One of the men in the house hit Pantoja with his pistol, grabbed him and demanded, in English, "Where is the money?" Pantoja suffered a scratch and bruise on the bridge of his nose and a dark mark under his left eye from being hit with the butt of the pistol. Pantoja did not see the person who shot the gun inside the house, but it may have been the person who struck him.

Pantoja had approximately $110 in his wallet and $600 or $650 in his pants pocket he was going to send to his wife in Mexico. The men took the wallet out of his pants.

Pantoja thought the men were in the house for three to five minutes. When they heard sirens, they took off through the back of the house. Pantoja did not see what happened in the backyard.

While Pantoja was in the house, before shots were fired, the people being led from the SUV to the backyard were Corina Vargas, Julio Jimenez and Florentine Soto. Pantoja did not know them.

According to Vargas, near midnight on March 23, 2010, she was with her friend Soto, walking to the house on Thrasher to get methamphetamine. As they were walking, Soto waived down Jimenez, driving a green SUV; Vargas did not know Jimenez. Soto spoke to Jimenez in Spanish, and Vargas and Soto got into the car. It took less than five minutes to drive to the house on Thrasher, where Jimenez parked the SUV in the driveway.

Suddenly, the SUV was surrounded by people wearing black with their faces covered, demanding that the occupants get out of the vehicle. Soto and Jimenez got out;

Vargas stayed in the backseat with her purse. One or two people got into the front seat of the SUV, threatened Vargas and told her to get out of the car and go into the backyard. Vargas saw one of the people with Jimenez at the front doorstep of the house, trying to open the door with his keys. Vargas heard Jimenez say, "No. No. It's not my house."

Two of the men led Vargas to the backyard and told her to get on the ground, where she laid on her stomach, scared for her life. One man stayed with Vargas, about six feet from her with his gun pointed at the ground. He told Vargas to shut up and she would not get hurt. Someone took Vargas's purse while she was on the ground.

While Vargas was still on the ground, she heard two or three gunshots from inside the house, windows breaking, an infant crying, yelling, and then a siren. People fled the house, yelling, "the cops are coming." People were telling Jimenez, who was standing 20 feet from Vargas, to get down. Within seconds, someone shot him. Vargas heard four or five shots rapidly fired, like the shots from one gun. Vargas only saw the back of the person who shot Jimenez.

After it was quiet, Vargas got up and walked home. She did not call the police, as she was scared. The following day, a detective came to her house and brought her purse and identification card.

At about half-past midnight, a police officer was dispatched to the house on Thrasher. In the driveway was an SUV. Pantoja was in the house with his daughter; he was shaking and had been injured. Some blood spatter was found in the house. In the backyard, the officer found Jimenez, lying on the ground unresponsive, with a wound to the back of his head.

Accomplice Testimony[4]

Becerra, Flores and Virgen each testified against defendants, including Cerpa, at trial. Becerra testified in exchange for a 25-year-to-life sentence. Virgen was attacked while in custody awaiting trial, prompting him to agree to testify in exchange for a 15-year-to-life sentence. Flores, while in juvenile hall awaiting trial, also agreed to testify in exchange for a 10-year sentence and two strikes. The following is their version of the events in question.

Accomplice Flores

Flores joined the Norteño gang at age 14, and had attended several parties at the house in Keyes, where Cerpa and Roberto Osequeda lived. Flores considered the Keyes house to be a gang "headquarters" where gang members would meet, party and plan crimes.

Flores believed Cerpa was part of the "regiment", a group of Norteños that commits crimes to help prisoners on behalf of Nuestra Familia. In early 2010, Flores was directed by Joe Ramirez and Johnny Montalvo to participate with other gang members in an armed robbery; as instructed, he brought the proceeds from the robbery back to the Keyes house. The two ordered Flores to do the same for another robbery as well, this time from a taco truck. Cerpa was present when Flores brought the proceeds of both robberies back to the Keyes house.

On March 23, 2010, Flores received a call from Montalvo, telling him to report to the Keyes house. Montalvo told Flores that Rocha would pick him up, which he did in a black Jeep. Flores brought his nine-millimeter, as requested by Montalvo; Flores's brother, Juan, who also came along, brought a shotgun. There were 12–15 individuals in the house when they arrived, including Becerra, Lopez and Rodriguez. Cerpa was in the

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[4] Because much of the testimony was accomplice testimony, and because Cerpa raises issues concerning this testimony, it is set out separately from the remainder of the facts.

garage with Montalvo and Ramirez. Rocha joined them. Flores later testified he did not see Cerpa in the garage, but saw him at some point in the living room.

Montalvo told the group assembled in the kitchen that they would commit a home invasion robbery of a drug house on Thrasher Avenue and were to bring the drugs and money back to the house. Ramirez selected the ones to go on the mission and put Becerra in charge. Flores saw two revolvers and ammunition on the table. John Rivera told the group not to shoot anyone unless they had to, and warned them not to kill anyone.

Flores did not personally see Cerpa participate in any planning activity, but believed he must have been in on the plan because he was in a room in the house where the robbery was planned by gang leaders.

Six gang members left in Rocha's Jeep: Rocha (the driver), Flores, Becerra, Virgen, Lopez and Delvillar; Becerra was in charge. They wore masks made from ripped up shirts someone gave them at the house before they left. Flores carried his nine-millimeter; there was also a shotgun, a .38-handgun and a .357-handgun in the car. Three others (Rivera, Montalvo, and a third person) followed in a red car. They drove to the Thrasher house, stopping for gas along the way.

There was an SUV parked at the Thrasher house when they arrived. The gang members pulled the three occupants from the SUV and took the female's purse. They then took the three into the backyard and made them lie on the ground. Flores guarded the three while the others forced entry into the house. Lopez remained in the front of the house as a "lookout."

When Flores heard gunshots from inside the house, Jimenez got up and tried to jump the fence. Flores stopped him and made him get back on the ground. Becerra came out of the house and shot Jimenez.

When the gang heard sirens, they all ran back to the Jeep and Rocha drove off. The red car was behind them. As police followed them, Becerra collected the guns and

threw them out the window. Flores hid his nine-millimeter under the seat. The Jeep was stopped by a spike strip. Everyone fled; Flores was apprehended.

Accomplice Virgen

Montalvo called Virgen on March 23, 2010, and told him to come to the Keyes house because he needed help committing a robbery. Virgen had been to the Keyes house before and considered it a Norteño house. He recognized several fellow gang members there, but did not see Cerpa at the house that night, but had seen him at the house before.

Montalvo told the group gathered in the kitchen they would rob a drug house. Becerra and Montalvo brought guns into the room and handed them out. Ammunition was on the table. The gang used torn shirts and bandannas as masks. Montalvo told them not to shoot anyone, just scare them. They were supposed to get drugs and money and bring it back to the house.

Six of them left in a Jeep, while others followed in a red car. Montalvo said the red car would be used to crash into a police car as a diversion if there was a chase. They stopped for gas on the way.

An SUV was parked in the driveway of the Thrasher house when they arrived. They pulled the occupants out of the SUV, took them to the rear of the house and had them lie on the ground. Two or three gang members went into the house through broken windows. When Virgen heard gunshots from inside the house, and then sirens in the distance, he ran with the others and got into the Jeep. As he ran, he heard additional gunshots coming from the backyard.

The Jeep with all six of them drove away. As they were being chased, they threw guns and masks out the windows. The car stopped when it drove over a spike strip. Everyone ran; Virgen was found and arrested.

Accomplice Becerra

Becerra testified he was a Norteño gang member since the age of 10, and by the age of 16, had already committed 20 drive-by shootings. He had been a paid informant for the Modesto Police Department since August 2009; his fellow gang members were unaware he was an informant.

Becerra knew Osequeda, who introduced him to Cerpa. Osequeda and Cerpa lived together. Osequeda and Cerpa told Becerra there was nobody who had control ("the keys") of the East Side and offered Becerra temporary control of 15 Norteños. His chain of command went from Cerpa to Rivera to Ramirez, who was the boss of the regiment. Becerra testified that Cerpa had authority over lower-ranking members.

On March 23, 2010, Cerpa called Becerra to tell him he received a written note smuggled from Becerra's brother in jail, and that Ramirez wanted to talk to him about it. Becerra drove his mother's red Toyota sedan to the house in Keyes, where he and Osequeda waited for Cerpa to come home from work. When Cerpa arrived, he and Becerra talked about various things, including a home invasion that was going to happen that night. When Ramirez and Montalvo arrived at the house, Ramirez officially gave Becerra the "keys" to the East Side.

Becerra, Montalvo and Delvillar left for a short while and then returned to the house with Rivera around nightfall. A conversation took place, which included Cerpa, Osequeda, Ramirez, and Palomar Rodriguez. Cerpa had a plan for a home invasion robbery in Merced, but Becerra, who had just received "the keys" and wished to boost his status, said he knew of a drug house on Thrasher Avenue they could hit instead. The plan was agreed on and other gang members were called and told to come to the house on Keyes.

Becerra and Montalvo then went to see someone named Butch, who knew about the drug house and provided them with guns and a map to the house. Becerra and Montalvo then returned to the house on Keyes where a group of gang members was now

assembled. Ramirez was the chief planner who put Becerra in charge and selected the others to go along. Ramirez, Montalvo, and Becerra gave instructions to the group and Becerra handed out guns to the group. Cerpa and Montalvo went into Cerpa's room and retrieved ammunition (.357 bullets) for the guns from a drawer. Becerra was also present in the room. Cerpa also retrieved clothing from his closet for them to make masks.

Montalvo instructed Becerra to leave his wallet with his student ID and driver's license on the kitchen table at the Keyes house, because he did not want to take the chance of him leaving it at the crime scene.

Becerra left with Rocha, Flores, Virgen, and Lopez in Rocha's Jeep. Ramirez, Rivera, Cerpa and Montalvo came up with a last-minute plan to use Becerra's mother's red car as a second vehicle, and Montalvo, Rivera, Santos Cardenas, and Delvillar rode in that vehicle.

When they arrived at the Thrasher house and saw an SUV parked in the driveway, Becerra ordered the others to pull the three occupants from the vehicle and to take the woman's purse. Becerra assumed one of the three lived there and would have the keys to open the front door. When that did not work, he told the others to take the three into the backyard. He instructed Flores to have them lie on the ground.

Virgen and Rocha broke windows and entered the house while Becerra searched an outbuilding. When Becerra came out, he saw Jimenez trying to jump the fence. Flores and Becerra both told him to get down. Becerra was angry because he told Flores to watch them and he thought Jimenez was playing him for a fool. Becerra shot Jimenez three times.

They all ran back to the Jeep and Rocha drove off. When a police car started to chase them, Becerra told everyone to hand over their guns and masks and he threw them from the window. The Jeep finally came to a stop in an alley after the tires hit a spike strip. Everyone fled. When Becerra was captured, he asked to speak to Detective Hicks.

Rodriguez's Statement[5]

In November 2011, Rodriguez was interviewed regarding an attack on Virgen, while Virgen was in custody. A portion of Rodriguez's statement was introduced, via video recording, in which he stated Becerra went to Ramirez and asked to join the regiment. Ramirez, in turn, asked other gang members if they should allow Becerra to join. Although others advised against it, it was decided to give Becerra a chance. Rodriguez was at the Keyes address when Becerra suggested a home invasion robbery where they could get crystal methamphetamine, weed, and cash. Ramirez gave Becerra the green light and said he could be part of the regiment and would be given control of the Eastside. Ramirez told Rivera and Montalvo to make sure the job got done and to supply them with guns.

The Arrests

After a car chase, Virgen was arrested in a backyard on Parklawn Avenue. He had a cell phone and a small amount of cash on him. Becerra, who was stuck between a detached garage and the fence of the same backyard, surrendered within 10 to 15 seconds after an officer shone a light on him. Flores was discovered, wearing all black, underneath a minivan in the front yard of the house. Rocha, wearing a black sweatshirt and tan pants, was found hiding behind a fence a few houses down. He had a blood stain on his left knee and dried blood on his left palm. Lopez, wearing torn black clothing, was arrested in the same block of Parklawn. The Jeep was found in the alley with the passenger side door open.

Autopsy

An autopsy of Jimenez showed tool marks on his forehead matching the pattern from the gun barrel of a .357 recovered by police. He had bruising and tearing on the

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5 Due to the fact that one of the issues presented is whether Rodriguez was an accomplice as well, his statement is included here.

back of his head from being hit with the butt of a gun. He died of two gunshot wounds to the back.

Other Physical Evidence

A videotape from a few minutes after midnight on March 24, 2010, showed an SUV and a red passenger car pulling into a gas station, gassing up and then leaving.

A videotape of the Thrasher house made on March 24, 2010, showed, inter alia, one bullet hole in the kitchen ceiling and another in the ceiling of the room off the kitchen. A wallet was found next to a pair of pants in the hallway of the second bedroom, with $775 in cash in a pocket. Several windows in the house were broken. The backyard fence was kicked out.

Detective Michael Hicks was notified of the event at 1:17 a.m. After visiting the Thrasher site, he went to Parklawn Avenue, where he contacted Becerra, whom he knew. Becerra told Hicks, "I fucked up, Hicks." Becerra then helped Detective Hicks find evidence along the chase route—a single barrel shotgun, broken into three pieces, with a live round; red cloth; two loaded .357 revolvers; and a .38-handgun. Other items later recovered along the route included clothing, live shotgun shells, a black cotton glove, a white cloth, and a black latex glove.

The red Toyota was later found parked at the home of Becerra's mother. A wallet belonging to Delvillar was found in the glove box. A search of the Jeep on March 24, 2010, revealed a Taurus nine-millimeter semi-automatic firearm loaded with 14 rounds in the magazine underneath the driver's seat.

A March 28, 2010, search of Cerpa's room in Keyes house revealed six jacketed hollow point aluminum casing .357 bullets in a shirt pocket in the bedroom's closet. Also found in the home were handguns containing fired and unfired rounds, of the same make and type as the shells found in revolvers recovered from the chase route. Also in the room were red shirts and a K-Swiss shoebox. Cerpa was detained during the search,

and subsequently arrested. The house search also revealed latex gloves matching those worn by the perpetrators, as well as Becerra's wallet.

Defense

Cerpa's Defense

Detective Sean Martin testified that a SWAT team cleared the Keyes residence before it was searched and may have moved items before photographs were taken. Photographs of Cerpa's bedroom and the closet may not have necessarily reflected the location of items when they were originally found.

Rocha's Defense

Rocha testified in his own defense. In his testimony, he placed most of the blame on the other participants and claimed he was not guilty because he was merely following orders. Rocha testified he did not know what Cerpa's status was in the gang, but that Cerpa associated with a lot of gang members and was always present at parties at the Keyes house. Rocha thought Osequeda, Montalvo and Cerpa were all living at the Keyes house at the time of the robbery.

Montalvo called Rocha on the night of March 23, 2010, and told him to pick up other named gang members and bring them to the Keyes house. Once there, Rocha went into the garage and met Cerpa and Rivera, and the three drank beer and exchanged small talk. Cerpa and Rivera then left, saying they had something to discuss, and Rocha was left in the garage alone. He was later told he and his Jeep were needed for a robbery. When he went into the house, he saw 12 to 15 people, including all of his codefendants except Cerpa. Rocha testified that Montalvo brought guns into the room from somewhere down the hallway and grabbed clothes from a laundry bin in the kitchen for masks.

DISCUSSION

I. SUFFICIENT EVIDENCE OF CONVICTION

Cerpa was prosecuted as an aider and abettor for the murder of Jimenez. He contends there was insufficient evidence to support his convictions because "virtually all the evidence against him came from accomplice testimony without sufficient corroboration," noting Becerra was the only accomplice who claimed that he actually saw Cerpa participate in the planning of the crimes. We disagree.

Applicable Law

In reviewing the sufficiency of the evidence to support a defendant's conviction,

> "we examine 'the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact reasonably could deduce from the evidence. [Citation.] The jury, not the appellate court, must be convinced of guilt beyond a reasonable doubt; for us, '[t]he test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citation.]" (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024.)

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) The testimony of an accomplice must be corroborated by "such other evidence as shall tend to connect the defendant with the commission of the offense." (*Ibid.*) Such evidence may not come from or require "'aid or assistance from the testimony of'" other accomplices or the accomplice himself. (*People v. Davis* (2005) 36 Cal.4th 510, 543.)

Under section 1111, the jury had to conclude independent evidence linked Cerpa to the crimes before relying on the accomplices' trial testimony. (See *People v. Vu, supra,* 143 Cal.App.4th at pp. 1021–1022.)

> "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. [Citations.] The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies [citation] and need not establish every element of the charged offense [citation]. The corroborating evidence is sufficient if, without aid from accomplice testimony, it '"'tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.'"' [Citations.]" (*Id.* at p. 1022.)

Analysis

It is not disputed that Flores and Becerra were accomplices. While Becerra's testimony most directly connected Cerpa to the planning of the crimes, the testimony of Flores also connected Cerpa to the planning.

Flores testified that Rocha gave him and several others a ride to the house in Keyes. When they arrived Cerpa, who lived at the house, was in the garage with Montalvo, Ramirez, and another person; Rocha joined them. Later, Flores saw Cerpa in the living room. When he was asked whether he saw Cerpa take part in planning the crimes, Flores said, "I seen him at the house. He was in the room where everybody was planning stuff." When asked if he could be speculating because he was not in the room with Cerpa, Flores insisted that he was not guessing, "I know he was planning something in that room."

Flores later explained that Cerpa was a member of the "regiment," a group of Norteño gang members who commit crimes to provide revenue to fellow gang members in prison. When regiment members were together, they formed a "council," from which other gang members take orders.

Becerra's testimony reinforced Flores's version of the events. Becerra testified that Cerpa had authority over lower-ranking gang members, and Becerra had witnessed several previous instances of Cerpa having closed-door meetings with other high-ranking Norteños. According to Becerra, when he came to the Keyes house on March 23, Cerpa,

Montalvo, Osequeda, and Ramirez were in the living room planning a residential robbery. Becerra then introduced the idea of the drug house on Thrasher as a potential robbery target. Becerra testified that, after the other gang members arrived to carry out the robbery, Cerpa provided them with ammunition, including .357 bullets, from his bedroom.

Circumstantial evidence supports Flores and Becerra's testimony that Cerpa was a member of the team planning the robbery. A search of Cerpa's bedroom a few days after the incident revealed jacketed hollow point aluminum casing .357 ammunition of the exact type used in the Thrasher robbery. Evidence that a defendant possessed ammunition of the same caliber as the weapon used in the crime is corroborative. (*People v. Miller* (1954) 129 Cal.App.2d 305, 308 ["the gun used in the robbery was a .45 caliber and bullets of that caliber were found in appellant's room"].) In this case, the ammunition found in the pockets of clothing in Cerpa's bedroom closet matched not only the caliber, but also the brand, head stamp, and casing material of the ammunition used in the shooting.

Cerpa relies, in part, on *People v. Braun* (1939) 31 Cal.App.2d 593 and *People v. Reingold* (1948) 87 Cal.App.2d 382 to advance his argument. We find both cases distinguishable. In *People v. Braun,* the prosecutor's theory was that the defendant planned, advised, and encouraged a café robbery during which the perpetrators shot two people, killing one. (*Braun, supra,* at pp. 596–597.) Independent evidence established that the defendant associated with the perpetrators, was present at the café when the crimes occurred, and later that day drove with the perpetrators out of state. However, this was insufficient to corroborate the theory that he aided and abetted the crime. (*Id.* at pp. 596–600.) Here, the independent evidence tied Cerpa personally to the ammunition used in the armed robbery.

And in *People v. Reingold* the defendant, a jeweler, was convicted of robbery and kidnapping on the theory that he advised and encouraged a jewelry robbery. (*People v.*

Reingold, supra, 87 Cal.App.2d at p. 392.) The only independent evidence was that the defendant knew one of the robbers, knew the victim owned a diamond ring, had threatened the victim when the defendant learned she bought the ring from another jeweler, and owned a gun similar to the one that accomplice claimed to have used. (*Id.* at pp. 394–397.) The defendant's connection to the robbery and victim connected him to the perpetrators, but was insufficient to connect him to the commission of the crime itself. (*Id.* at pp. 399–400.) In addition, the gun used in the robbery was never found and, as such, the defendant's gun had no tendency to show he advised and encouraged the robbery. (*Id.* at p. 405.) Here, Cerpa was not merely connected to the perpetrators of the crime. Nor did the independent evidence merely show the opportunity to possibly aid and abet the robbery. Instead, the independent evidence that Cerpa personally possessed ammunition in his room at the Keyes house whose brand, head stamp, and casing material exactly matched the ammunition used in the robbery was sufficient.

In addition, other independent evidence shows that planning activity took place at the Keyes house where Cerpa lived. When the house was searched after the robbery, latex gloves matching those worn by the perpetrators were found, as well as a host of gang indicia. And Becerra's wallet was found in the laundry room. These facts independently connect the Keyes house to the planning of the robbery and give further weight to the corroborating effect of the ammunition and Cerpa's participation in the planning of the crimes.

Sufficient corroborating evidence supports the accomplice testimony to find Cerpa guilty of the crimes, and we reject his argument to the contrary.

II. FAILURE TO INCLUDE RODRIGUEZ IN ACCOMPLICE INSTRUCTIONS

The trial court gave accomplice instructions for the four accomplices who gave testimony (Virgen, Flores, Becerra, and codefendant Rocha). Cerpa contends the trial court erred when it did not include Rodriguez as an accomplice in the instructions as

well. Cerpa contends the failure to do so "may have misled jurors to believe that they could rely on his prior statement as supplying some quantum of corroboration." We find no prejudicial error.

Background

At trial, Becerra testified that Rodriguez was at the Keyes house when the robbery was planned. Flores also identified Rodriguez as being present when the robbery was planned.

Rodriguez was interviewed by Detective Martin in November 2011. During trial, codefendant Rocha's counsel indicated his desire to admit this interview of Rodriguez to impeach Becerra's credibility. Counsel for the other codefendants, including Cerpa's counsel, objected to the testimony due to concerns about admissibility and the defendants' confrontation rights. After much discussion, the trial court and parties agreed to allow Rocha's counsel to admit a four-minute excerpt of a police interview with Rodriguez. The video, along with the transcript, redacted the names of the codefendants, including Cerpa's. Rocha's counsel then admitted the abridged video and transcripts of Rodriguez's interview while counsel was cross-examining Detective Martin, who had interviewed Rodriguez. The video was played for the jury.

The portion that was played is summarized as follows: Becerra went to Ramirez and asked to join the regiment. Although others advised against it, Ramirez and another gang member decided to give Becerra a chance. Rodriguez was in Keyes when Becerra suggested a home invasion robbery where they could get drugs and cash. Ramirez said okay, that he could be a part of the regiment, and that he would be given control over the Eastside. Ramirez told Rivera and Montalvo to make sure that the job got done and to supply them with guns.

Applicable Law and Analysis

As stated above, section 1111 prohibits conviction on the testimony of an accomplice unless the testimony is corroborated by other evidence tending to connect the defendant with the commission of the crime. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270.) Again, an accomplice is "one who is liable to prosecution for the identical offense charged against the defendant ...." (§ 1111.)

> "When the evidence at trial would warrant the jury in concluding that a witness was an accomplice of the defendant in the crime or crimes for which the defendant is on trial, the trial court must instruct the jury to determine if the witness was an accomplice. If the evidence establishes as a matter of law that the witness was an accomplice, the court must so instruct the jury, but whether a witness is an accomplice is a question of fact for the jury in all cases unless 'there is no dispute as to either the facts or the inferences to be drawn therefrom.' [Citation.]" (*People v. Hayes, supra,* at pp. 1270–1271.)

In the instant case, the trial court gave an accomplice instruction, CALCRIM No. 335, that Virgen, Flores, Becerra and Rocha were accomplices and prohibited the use of uncorroborated accomplice testimony to convict a defendant. The court, however, did not instruct the jury that it had to determine whether Rodriguez was an accomplice or instruct that he was an accomplice as a matter of law. Assuming the trial court was required to do one or the other, it erred. (See *People v. Hayes, supra,* 21 Cal.4th at pp. 1270–1271.)

Instructional error is subject to harmless error review. (*People v. Flood* (1998) 18 Cal.4th 470, 490, 502–504.) Because the omitted instruction is based on section 1111, the asserted error is one of state law, subject to the reasonable probability standard of harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836–837 (*Watson*). (See *People v. Rogers* (2006) 39 Cal.4th 826, 875.)

This is not a case in which all accomplice testimony instructions were omitted. As noted above, the trial court instructed the jury on how to treat accomplice testimony, but failed to include Rodriguez in that instruction. Even where there is a failure to instruct on

accomplice testimony, such error is harmless if there is sufficient corroborating evidence in the record. (*People v. Hayes, supra*, 21 Cal.4th at p. 1271.) Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. (*Ibid.*) Sufficient corroborating evidence was provided in this case, as discussed above, that Cerpa was involved in the planning of the crimes.

Several other factors suggest a lack of prejudice in the failure to include Rodriguez in the instruction. Rocha's counsel requested the interview with Rodriguez be admitted to impeach the credibility of several of Becerra's claims. While the unredacted version of Rodriguez's statement did implicate Cerpa, Cerpa's name was subsequently not mentioned in Rodriguez's testimony at trial. And, in fact, during closing argument, Cerpa's counsel argued that Rodriguez's statements were affirmative proof that Cerpa was not present during the planning of the robbery.

Any mistake in not including Rodriguez in the accomplice instruction was harmless.

III. FAILURE TO DEFINE THE TERM "ACCOMPLICE"

Cerpa argues that the trial court erred when it instructed that several witnesses were accomplices as a matter of law, but failed to also instruct on the definition of the term "accomplice" itself. As noted above, the trial court instructed that if the crimes were committed, Virgen, Flores, Becerra, and Rocha were accomplices to those crimes and their testimony needed to be corroborated. Cerpa does not argue that the individuals named in the instruction were not accomplices, but that the instruction, without further definition, "implies that a person who is named as an undisputed 'accomplice' is an actual accomplice to every defendant. If they were accomplices of [Cerpa], by parity of reasoning, [Cerpa] would be an accomplice of each of them," and therefore guilty as well.

As a preliminary matter, we note respondent's argument that any error with regard to the accomplice jury instructions is forfeited because Cerpa did not object to the instruction. However, a defendant may assert instructional error on appeal when it affects his substantial rights. (§ 1259 ["appellate court may … review any instruction given, refused or modified even though no objection was made thereto in the lower court if the substantial rights of the defendant were affected thereby"]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103, fn. 34 [permitting defendant to raise instructional error in accomplice instructions where defendant did not object to instruction at trial].) Further, our Supreme Court stated that "[t]he trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 229.) We therefore address Cerpa's argument on the merits but find no prejudicial error.

Applicable Law and Analysis

As stated previously, an accomplice is defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. (§ 1111.) The jury was instructed that the witnesses Virgen, Flores, Becerra and codefendant Rocha were accomplices to the crime, but only if the jury determined a crime had been committed. The question before us is whether the trial court should have instructed further on the definition of accomplice in order to clarify that the accomplices named were not necessarily accomplices to Cerpa or to imply that Cerpa participated in the crimes.

In support of his argument, Cerpa relies on *People v. Hill* (1967) 66 Cal.2d 536 (*Hill*), in which three codefendants were charged with murder, intent to commit murder, and robbery. (*Id.* at pp. 542–543.) Only one codefendant, Madorid, testified in his own

behalf. His testimony constituted a judicial confession as to him and implicated the other two codefendants. (*Id.* at p. 555.) While Madorid was "clearly" an accomplice as a matter of law, the trial court did not instruct as such. Instead, it instructed that it was for the jury to determine whether Madorid was an accomplice. The *Hill* court found no error, as the instruction, as given, avoided imputations of guilt of the other two codefendants "which might have flowed from the court's direction that the confessing Madorid was their accomplice as a matter of law." (*Id.* at p. 556.)

Cerpa also relies on *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1266 (*Johnson*), in which two jointly tried defendants each took the stand in their own defense, proclaiming innocence, and incriminating the other. (*Id.* at pp. 1251, 1266.) The trial court instructed the jury that, if a crime had been committed, each defendant was an accomplice as a matter of law. (*Id.* at p. 1266.) The *Johnson* court found this error, stating that, because each defendant denied guilt, it was not the case that "undisputed evidence established that the defendants were accomplices." (*Id.* at p. 1271.) Thus, where each defendant was claiming to be entirely innocent, an instruction stating each was an accomplice as a matter of law could only have had the effect of imputing guilt to that defendant. (*Ibid.*)

We find both *Hill* and *Johnson* distinguishable from the facts before us. Here, unlike in *Hill*, no codefendant confessed his guilt on the stand. Rocha, the only codefendant listed as an accomplice, denied guilt on the stand but implicated his codefendants. And the facts of *Johnson* say nothing about the effect of the accomplice instruction on a non-testifying codefendant who is never mentioned in the instruction.

Instead, we agree with *People v. Cisneros* (1973) 34 Cal.App.3d 399, 413, (disapproved on another point in *People v. Ray* (1975) 14 Cal.3d 20, 30, fn. 8) that, "[w]here such witness is an accomplice as a matter of law, the court should so charge, and an instruction defining an accomplice is not necessary." (See *People v. Featherstone* (1945) 67 Cal.App.2d 793, 797.) The instruction, as given, did not explicitly or

implicitly impute guilt to Cerpa. Instead, the accomplice instruction benefited Cerpa by increasing the prosecutions' burden of proof needed to convict Cerpa on the basis of the accomplices' testimony. Defining "accomplice" would not have changed the instruction's meaning, and we reject Cerpa's claim to the contrary.

In any event, even assuming instructional error, we find no prejudicial harm. Instructional error as to accomplice instruction is generally subject to the *Watson* standard of review. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214; *People v. Heishman* (1988) 45 Cal.3d 147, 163–164 ["Prejudice from failure to give proper accomplice instructions is measured by the test of *People v. Watson* ... i.e., whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error"], abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190, 1195.)

There is no reasonable likelihood the jury understood the accomplice-testimony instruction to direct a guilty verdict for Cerpa. The jury was properly instructed that the prosecution bore the burden of proving Cerpa guilty of all charges beyond a reasonable doubt. The jury was also instructed at length on the proper manner of evaluating the evidence and the necessity for it to decide "whether a fact in issue has been proved based on all the evidence." And the instructions for each of the crimes and enhancement again reminded the jury that "the People must prove" each element of the respective charges.

The prosecutor, in closing, never asserted the notion that Cerpa was necessarily guilty of all crimes because he was an accomplice. Instead, the prosecutor's arguments were consistent with the understanding that the jury had to find all of the elements of the crimes beyond a reasonable doubt. The prosecutor framed the issue as a question "[D]id the defendants … either participate in or aid and abet a residential robbery?" When explaining the accomplice instruction, the prosecutor stated,

> "Accomplice testimony must be supported by independent evidence. I cannot prove a crime occurred based on the accomplice testimony alone. I

> can't ask you to find any of the four defendants guilty without supporting evidence, evidence supporting the accomplices' testimony."

The prosecutor then outlined the evidence corroborating the accomplices' incriminating testimony. Any instructional error was not exacerbated by the prosecutor's argument, but instead reinforced the instructions as a whole—that the jury had to determine every element of the charged offenses.

Finally, as noted in part I. of the discussion, *ante*, the evidence of Cerpa's guilt was substantial.

IV. PROSECUTORIAL MISCONDUCT

Cerpa next asserts the judgment must be reversed due to prosecutorial misconduct during the trial, citing the prosecutor's statements at three instances during trial: during the gang expert's testimony; during initial closing argument; and during rebuttal. We find no prejudicial error.

Background

The instances of alleged prosecutorial misconduct all stem from certain testimony of accomplice Flores. At trial, Flores testified he committed two prior robberies at the behest of Ramirez and Montalvo and that he took the loot back to the Keyes house. When asked who lived at the Keyes house, Flores responded, "Joker," meaning Cerpa. Flores had been at the Keyes house, a headquarters for the gang, numerous times and had seen Cerpa there with Ramirez a half-dozen times. When asked if Cerpa was present when Flores brought the loot back to the house after the second robbery, Flores said he was. During his testimony, "Joker's house" and the "house in Keyes" were used interchangeably.

When later questioning the gang expert, the prosecutor asked: "[Y]ou heard Daniel Flores testify in front of this jury that he was committing armed robberies, taking the money back to Joker to pay the regiment?" Cerpa's counsel objected, stating the question misstated the evidence. The prosecutor countered that, while not the exact

wording, he believed the statement was "100 percent accurate." The trial court overruled the objection. Cerpa contends this was misconduct on the part of the prosecutor because Flores referred to the Keyes house as "Joker's house," not because Cerpa was the sole occupant or the elder of the house, but merely because Cerpa lived there.

Cerpa also contends the prosecutor committed misconduct during closing argument, when he again stated that Flores committed prior robberies for the gang and that the "[m]oney goes to Joker." In response, during closing, Cerpa's defense counsel argued there was insufficient evidence to convict Cerpa as Becerra was the only person to put Cerpa "into the crime." Defense counsel stated that, while Flores testified that Cerpa was present at the Keyes house during past criminal activity discussions, he never testified Cerpa actively participated in the discussions, and there was no evidence he had any involvement in the current robbery or the previous robberies or that he received "any of the fruits obtained."

Cerpa contends the prosecutor continued the misconduct in rebuttal when he again argued that Flores was instructed to bring the money from the two previous robberies back to Cerpa.

Applicable Law and Analysis

The general rules applying to claims of prosecutorial misconduct are as follows: Under the federal Constitution, to be reversible, a prosecutor's improper comments must "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.] '"But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citations.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) When the claim of prosecutorial misconduct "is based upon 'comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that

the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' [Citations.]" (*Id.* at p. 1001.)

"A defendant generally ""'may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]'" [Citation.]' [Citation.] A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.) Here, while Cerpa did not object to the last two instances of which he now complains, he did object to the initial instance. Since all three instances are based on the same premise, we will address the merits of Cerpa's argument. In doing so, we eliminate the need to address his alternate argument that counsel was ineffective for failing to object.

Misstating the Evidence

Cerpa contends the prosecutor's statement that Flores took robbery money back to Cerpa misstated the testimony in a way that bolstered a critical weakness in the People's case and misled the jury to the People's advantage.

It is misconduct for the prosecutor to misstate the facts, but "[p]rosecutors have wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) It is the jury's job to decide "[w]hether the inferences the prosecutor draws are reasonable," and on appeal "we must view the statements in the context of the argument as a whole. [Citation.]" (*Ibid.*) "Ultimately, the test for misconduct is whether the prosecutor has employed deceptive or reprehensible methods to persuade either the court or the jury." (*Ibid.*)

Here, Flores testified that he committed two prior robberies at the behest of Ramirez and Montalvo and that he took the loot back to the Keyes house. When asked who lived at the Keyes house, Flores responded, "Joker," meaning Cerpa. Flores had

been at the Keyes house, a headquarters for the gang, numerous times and had seen Cerpa there with Ramirez a half-dozen times. When asked if Cerpa was present when Flores brought the loot back to house after the second robbery, Flores said he was. During his testimony, "Joker's house" and the "house in Keyes" were used interchangeably. Subsequently, the prosecutor repeated both while questioning the gang expert and then during closing and rebuttal, that Flores had said he committed armed robberies and the money was taken back to Cerpa.

In response, during closing, Cerpa's defense counsel argued that, while Flores testified that Cerpa was present at the Keyes house during past criminal activity discussions, he never testified Cerpa actively participated in the discussions, and there was no evidence he had any involvement in the current robbery, the previous robbery, or that he received "any of the fruits obtained."

We find that Flores's testimony permitted the inference that money from the previous robberies was taken to Cerpa, either individually or with others. Because the prosecutor did not "substantially misstate the facts or go beyond the record" (*People v. Dennis, supra,* 17 Cal.4th at p. 522), he did not commit misconduct by arguing as he did.

In any event, we find no prejudice resulted if misconduct occurred. While Cerpa argues the prosecutor's misstatements "gave jurors the false impression" that Cerpa routinely sent "junior gang members to commit robberies on his behalf," and must have done so in the current case as well , the jury was instructed that nothing the attorneys said constituted evidence and that "[i]n their opening statements and closing argument, the attorneys discuss the case, but their remarks are not evidence. Only the witnesses['] answers are evidence." The prosecutor emphasized this point in closing argument as well, telling the jury "do not consider defense arguments or even [p]rosecution arguments as evidence. Look at the evidence as presented and piece it together yourselves." Jurors are presumed to understand and follow the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

V. NO PREJUDICIAL ERROR IN ADMISSION OF ALLEGED HEARSAY FROM FLORES

Cerpa next argues one of Flores's statements was prejudicial inadmissible hearsay. We disagree.

Factual Background

During his testimony, Flores detailed his experience delivering the proceeds from a prior robbery to Joker's house or the house in Keyes. As to a second prior robbery, he stated that he delivered the proceeds to Joker's house and named Montalvo and Ramirez. When asked if Cerpa was present during either of the deliveries of the robbery proceeds, Flores stated he was. When Flores testified as to the current robbery, he stated he was picked up by Rocha and brought to the Keyes house; Flores's brother Juan was also in the vehicle driven by Rocha.

On cross-examination by Delvillar's counsel, Flores was asked about the March 8, 2010, taco truck robbery Flores committed with his brother, and whether Delvillar was present at the robbery. Flores stated Delvillar was not present, and confirmed that Delvillar was not present at the March 12, 2010, market robbery either. When asked if his brother was in prison for a robbery he and two others (Spinella and Gutierrez) committed on March 19, 2010, Flores said, "Umm, not that I'm aware of." When pressed further and shown a charging document for the case involving his brother, Flores stated he knew his brother went to prison for robbing a store, but "didn't know what case it was."

On redirect, the prosecutor questioned Flores as follows:

> "[Prosecutor]: Now, again, getting back to your brother's robbery that you see on a certified conviction, March 19th, 2010, based on what you know about what was going on with your brother and with you, in March 23rd, was your brother putting in work for the Norteño gang with Spinella and Gutierrez?
>
> "[Flores]: Yes.

"[Prosecutor]: Spinella, Gutierrez, and your brother …. Where did the proceeds of the robbery go to?

"[Flores]: Back to [Ramirez] and [Cerpa]; everybody that was at the same house.

"[Cerpa's Counsel]: Objection, Calls for speculation, Your Honor. Lacks personal knowledge. Facts not in evidence.

"[Prosecutor]: Let me ask you a question. Did your brother ever tell you about why he didn't want to do the … Thrasher robbery?

"[Flores]: He said 'cuz he didn't feel safe doing it.

"[Prosecutor]: Did your brother tell you where he had to report after committing the robberies he committed?

"[Flores]: Yeah—

"[Cerpa's Counsel]: Objection. Calls for hearsay, Your Honor. Confrontation. Umm, personal knowledge. Foundation.

"[Prosecutor]: This would be an admission of somebody who was convicted of [a] crime which is part of the record now for this jury. If he's admitting where the proceeds from the robbery go, it's going to his specific intent to benefit the Norteño gang.

"[Cerpa's Counsel]: Your Honor, I have no way of questioning the person that's not here that supposedly gave this witness the statement.

"[Prosecutor]: He's right here for cross-examination.

"[The Court]: The objection is overruled.

"[Prosecutor]: Did your brother tell you where the proceeds from the robberies that Mr. Sullivan laid out, the ones you committed with him also?

"[Flores]: All those robberies that were happening in that time period were going back to the same house."

"[Prosecutor]: To Joker's house?

"[Flores]: Yes."

Applicable Law and Analysis

Cerpa contends the statement—"All those robberies that were happening in that time period were going back to the same house"—was inadmissible hearsay and wrongly admitted because Flores did not have personal knowledge of the March 19, 2010, robbery his brother participated in.

A witness's testimony must be based on personal knowledge. (Evid. Code, § 702, subd. (a).) Hearsay is an out-of-court statement offered for the truth of its content, and is inadmissible under state law unless it falls under an exception to the hearsay rule. (*People v. Sanchez* (2016) 63 Cal.4th 665, 674–675 (*Sanchez*); Evid. Code, § 1200, subds. (a), (b).) A trial court's evidentiary ruling is reviewed for abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) A "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 375.)

We agree with respondent that no hearsay error occurred. While the question posed to Flores, "Did your brother tell you where the proceeds from the robberies that [Delvillar's counsel] laid out, the ones you committed with him also?" called for hearsay, Flores's response was not a hearsay statement. Instead of describing what his brother told him, Flores explained from his own knowledge what had occurred. Flores had already testified that he personally took the money from several robberies to Cerpa's house. Because the prosecutor narrowed the inquiry to robberies Flores participated in, Flores answered from his own personal knowledge and not by referring to any statement supposedly made by his brother.

In any event, even if error occurred, no prejudice resulted. Even had Flores testified that his brother told him the proceeds from the robberies he committed were taken to Cerpa's house, the testimony would have been cumulative of his own testimony. (*People v. McClennegen* (1925) 195 Cal. 445, 472 [hearsay merely cumulative and not prejudicial].) While Cerpa argues that the alleged hearsay statement was prejudicial

because it was used to advance a theory that Cerpa was a senior gang member who directed junior gang members to commit robberies, the prosecutor never argued such in closing, and did not refer to any statement made by Flores's brother at all.

There is no reasonable probability Cerpa would have had a more favorable result had the statement been excluded, nor did it render the trial fundamentally unfair. We reject Cerpa's claim to the contrary.

VI. FLORES'S TESTIMONY ON CERPA'S PARTICIPATION

In a somewhat related argument, Cerpa also contends the trial court abused its discretion when it allowed Flores to testify that Cerpa participated in planning the Thrasher robbery because he did not have personal knowledge of that fact. Again, we find no prejudicial error.

Factual Background

As stated previously, Flores testified about the events at the Keyes house on the night in question and stated Cerpa was present. According to Flores, when he first arrived, Cerpa was in the garage, along with Montalvo, Ramirez, Rocha, and one other he did not recall. Flores entered the house through the front door, not the garage, and waited there "a few hours" while the planning continued. When questioned if he saw Cerpa come out of the garage, he stated he did not remember, but he did see him in the living room at some point.

Cerpa's counsel cross-examined Flores and asked him about his testimony before the grand jury. Flores acknowledged that he had at that time said that he did not see Cerpa participate in the planning of the robberies in "my presence," but had seen him at the house and that Cerpa was in the room "where everybody was planning stuff." When asked if he was guessing as to what Cerpa was doing, Flores stated "No, I'm not guessing. I know he was planning something in that room."

When questioned on redirect by the prosecutor, Flores stated he knew Cerpa was part of the planning of "these robberies" "[b]ecause he was in the room with everybody else when they were planning it." Cerpa's counsel objected on the basis of a lack of personal knowledge, which was overruled. Flores explained that Cerpa was with other persons in the "regiment" at the time, which formed a "council," which gave orders to other gang members.

Applicable Law and Analysis

As noted above, the Evidence Code declares that "the testimony of a witness [at trial] concerning a particular matter is inadmissible unless [the witness] has personal knowledge of the matter." (Evid. Code, § 702, subd. (a).) When a witness's personal knowledge is in question, the trial court must make a preliminary determination of whether "there is evidence sufficient to sustain a finding" that the witness has the requisite knowledge. (Evid. Code, § 403, subd. (a)(2).) "'Direct proof of perception, or proof that forecloses all speculation is not required.'" (*People v. Cortez* (2016) 63 Cal.4th 101, 123–124, quoting *Miller v. Keating* (3rd Cir. 1985) 754 F.2d 507, 511.) The trial court may exclude testimony for lack of personal knowledge "'*only if no jury could reasonably find* that [the witness] has such knowledge.'" (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) Thus, "[a] witness challenged for lack of personal knowledge *must* … be allowed to testify *if there is evidence from which a rational trier of fact could find* that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible. [Citation.]" (*Id.* at p. 574.) An appellate court reviews a trial court's determination of this issue "under an abuse of discretion standard." (*People v. Tatum* (2003) 108 Cal.App.4th 288, 298, citing *People v. Lucas* (1995) 12 Cal.4th 415, 466.)

The record here reveals no abuse of discretion. Insofar as Flores's statements suggest that Cerpa knew of and went along with the plan to commit the robbery, there was ample evidence from which a rational trier of fact could conclude that Flores had personal knowledge of these matters. The fact that Flores did not see the events in the garage and his uncertainty about certain facts surrounding the situation went to the weight of Flores's testimony, not its admissibility. (See, e.g., *People v. Anderson, supra,* 25 Cal.4th at pp. 574–575 [trial court correctly allowed clearly delusional witness to testify and "to permit the jury to determine from all the relevant evidence whether her perceptions and memories were true."].) Flores was in the Keyes house when the planning took place; he knew which gang members were in charge of planning; and he witnessed the results of that plan. His statement that he knew they were planning "something in that room" allows for the inference that Flores personally perceived the planning apart from seeing it with his eyes. There was sufficient evidence from which the trial court could conclude Flores had personal knowledge that Cerpa participated in planning the robbery. We find no abuse of discretion on the part of the trial court.

Even assuming error occurred, there is no reasonable likelihood of prejudice or miscarriage of justice resulting from the admission of the testimony. Becerra also testified that Cerpa was part of the planning of the robbery, as he participated in the planning with him. And, as discussed, in part I., *ante*, we have already concluded there was sufficient evidence of Cerpa's participation in the crimes to uphold his convictions, even without Flores's testimony.

And despite Cerpa's claims to the contrary, the jury was correctly instructed pursuant to CALCRIM No. 226 that, to evaluate a witness, it should take into account how well the witness saw, heard or perceived the things about which the witness testified, and how well the witness was able to remember and describe what happened. Finally, Cerpa's counsel critically dissected Flores's statements in closing. Thus, the jury would only have credited Flores's testimony to the extent it found his statements rooted in

personal knowledge. It is unlikely that the jury would have found Flores's testimony speculative but still relied on it.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Cerpa contends he received ineffective assistance of counsel because counsel failed to object to the prosecutor's closing argument when the prosecutor misstated the evidence and inflamed the passions of the jurors. We find no prejudicial error.

Applicable Law

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Construed in light of its purpose, the right entitles the defendant not to some bare assistance but to effective assistance. (*Ibid.*) To establish ineffective assistance of counsel, "'a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant ....'" (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffective assistance. (*People v. Avena* (1996) 13 Cal.4th 394, 444–445.)

"[I]n assessing a Sixth Amendment attack on trial counsel's adequacy mounted on *direct appeal*, competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney's choice." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260; accord, *People v. Stewart* (2004) 33 Cal.4th 425, 459.) Cerpa bears the burden on the basis of facts, not speculation, that trial counsel rendered ineffective assistance. (*People v. Mattson* (1990) 50 Cal.3d 826, 876–877.)

Initially we note, as to both instances of ineffective assistance of counsel of which Cerpa complains, that defense counsel was not asked to explain his tactical decision. Claims of ineffective assistance should be raised in a petition for writ of habeas corpus,

not in a direct appeal, where counsel can respond to any claims of ineffective assistance. (*People v. Ray* (1996) 13 Cal.4th 313, 349.) Furthermore, when the "'" record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Regardless, as we explain below, we cannot say that counsel's failure to object constituted ineffective assistance.

Misstating the Evidence

Cerpa first contends counsel was ineffective for failing to object to the prosecutor's misstatement of the evidence in rebuttal argument.

In his trial testimony, Flores made no mention of Cerpa retrieving ammunition from his room in order to commit the Thrasher robbery. During closing, Cerpa's defense counsel argued that Becerra was the only person who could connect Cerpa to the crime. In rebuttal, the prosecutor argued:

> "That's not true, as you know. Domingo Becerra certainly gave you insight on Joker, big homie, but you also had Daniel Flores, once again, talking about Cerpa. Daniel Flores, in addition to saying that Cerpa, or Joker, is the one Flores was instructed to bring all the money from the other two robberies back to, but Flores told you, Cerpa got the ammunition from his room, something you already know from the physical evidence and other testimony."

There was no objection to these comments by Cerpa's counsel.

However, any ineffective assistance of counsel was not prejudicial. While Flores did not testify that he had seen Cerpa retrieve the ammunition from his room, there was other physical evidence found in a search of the Keyes house placing the ammunition in Cerpa's clothing in his closet. Also, Becerra testified that he and Cerpa went into Cerpa's room and retrieved ammunition.

Additionally, the instructions to the jury adequately addressed any misstatements of evidence by instructing the jury what constituted evidence and specifically, that the

comments and closing arguments of the attorneys were not evidence. Coupled with the instructions conveying the need to establish each element beyond a reasonable doubt and the definition of the proper standard of proof, it is not reasonably probable that the absence of an objection deprived Cerpa of a more favorable outcome. (*People v. Osband* (1996) 13 Cal.4th 622, 698.)

Appealing to the Passions of the Jurors

Cerpa also contends counsel was ineffective for failing to object to the prosecutor's comments appealing to the passions of the jurors.

During closing, the prosecutor referred to the Thrasher robbery and stated, in part,

> "I want you all, during the closing arguments today and tomorrow, to keep on the back of your mind what it must have been like being inside that house … sleeping on a mattress with your three-year-old daughter when the gang was conducting its primary activities. This is just another day in the Norteño gang, as you know."

The prosecutor continued, stating that the Norteños commit many types of crimes and do not want anyone to call the police on them because, "[t]hat's how we roll as Nortenos. Be afraid of us."

Later during closing, the prosecutor addressed the arguments of codefendants that, despite the fact that they were gang members, they were not culpable for the gang activities. Specifically, as to codefendant Rocha, whose defense was one of duress, the prosecutor asked the jurors to "put yourselves in the shoes of one of those … female taco truck workers." The prosecutor asked whether a situation like that was one "you could brush off and go back to work" or instead "something you would take home and you would weep yourself to sleep, be terrified to go back to work, be terrified the next time a crew of young men show up in dark clothing?"

No objection to either statement was made.

Ordinarily, a prosecutor may not appeal to the jurors' sympathies by asking them to view the case through the victim's eyes. (*People v. Lopez* (2008) 42 Cal.4th 960, 969–

970; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1344 [prosecutor's appeal to jurors to view the crime through the murder victim's eyes was misconduct, albeit not prejudicial]; *People v. Shazier* (2014) 60 Cal.4th 109, 146 [prosecutors "generally may not appeal to sympathy for the victims by exhorting the jurors to step into the victims' shoes and imagine their thoughts and feelings as crimes were committed against them"].)

Respondent contends the prosecutor's comments were not misconduct, as the element of fear was relevant to both the robbery charges and the gang enhancement. And while Pantoja, who was inside the Thrasher property, was the victim of the charged robbery, the female taco truck workers were not victims of the crimes charged in this case. Assuming arguendo that the comments were improper, we do not find counsel's failure to object prejudicial. Contrary to Cerpa's suggestion, the comments in closing cannot be said to have rendered his entire trial fundamentally unfair. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 823–835, 845–846 [reversing conviction due to cumulative prejudice from numerous instances of prosecutorial misconduct and other errors throughout trial].) Nor is a more favorable verdict reasonably probable. The jury was instructed not to be influenced by sympathy, and nothing in the record suggests that it was. The prosecutor did not appeal to the jury's sympathy with regard to Vargas, the other victim of the robbery, or Jimenez, the murder victim, yet the jury still found Cerpa guilty of those crimes as well. On this record, we find neither reversible prosecutorial error nor ineffective assistance of counsel.

VIII. *SANCHEZ* ERROR

Cerpa next contends that a large portion of the gang expert's testimony was inadmissible under *Sanchez, supra,* 63 Cal.4th 665, which was decided almost four and one-half years after his trial, but the holding of which is applicable retroactively to these pending proceedings. Specifically, Cerpa contends that the gang expert erroneously related case-specific testimonial hearsay to support an opinion that Cerpa, each

codefendant, and others connected to the case were Norteño gang members, prejudicing both the verdict on the substantive charges and the gang findings. We find no prejudicial error.

Background

At trial, gang expert Detective Martin testified there were approximately 5,000 Norteño gang members in Modesto at the time of the charged crimes. According to Detective Martin, the Norteños associate with the color red, the number 14, and that one gained status in the gang by "putting in work", meaning committing crimes for the gang. Detective Martin explained that respect was the "foundation" of the gang, in other words, "[i]f you respect me, you fear me, as a gang member." Detective Martin testified that drug sales and robberies were some of the gang's primary activities. Detective Martin identified a Norteño group called the "regiment", headed by Ramirez, a high ranking gang member. Detective Martin stated he was involved in investigating about 20 residential and commercial robberies involving Ramirez.

Detective Martin then testified as to each codefendant in the current case, including Cerpa. He testified that he did an independent investigation into the history of each codefendant to determine if they could be documented as a gang member according to the "Modesto Police criteria." Detective Martin testified there were 10 criteria; a minimum of two must be met for the police department to consider a person a gang member.

Detective Martin testified that Cerpa met "seven of the 10 but a little different with him. He meets more of the criteria more times over," in total 24 times. Martin then detailed the following prior incidents for Cerpa: (1) a 2003 field identification (FI) card noting Cerpa was wearing a red hat, red shirt, red belt, and admitted to being a Norteño for many years; (2) a 2004 sheriff's report from Keyes stating Cerpa was a gunshot victim found in the company of two other gang members; (3) a 2004 traffic stop in which

Cerpa was seen wearing a red belt with the letter "N" on the buckle; (4) a 2005 incident in which Deputy Hill, who was conducting a stolen property investigation, saw Cerpa wearing red shorts and red/white shoes, and Cerpa admitted to a booking officer that he was a Norteño in good status; (5) a 2005 FI card completed by Deputy Costa, which stated Cerpa was wearing red shorts and red shoes, and had tattoos; (6) a 2006 investigation in which Detective Gumm documented Cerpa wearing red K-Swiss brand shoes, an acronym for "Kill scrap when I see scrap", and although Cerpa told Gumm he was no longer an active Norteño, he told the booking officer that he was; (7) a 2008 traffic stop in which Officer Ramar saw Cerpa wearing K-Swiss brand shoes, and Cerpa admitted to the officer that he was and had been a Norteño since he was 13; and (8) the 2010 search of Cerpa's residence Martin conducted in connection with the charged offenses.

Detective Martin then identified a photograph from an FI card showing a frontal view of Cerpa, in which he has the word "Norte" tattooed on his chest. Cerpa also had the word "Llaves," which translates to Keyes, an area specifically associated with Norteños, tattooed on the back of his head, and one dot on the finger of one hand and four dots on the fingers of the other hand, to signify the number 14.

Detective Martin opined that Cerpa was a Norteño gang member at the time of the March 24, 2010, incidents. Furthermore, taking into consideration the accomplice testimony, Detective Martin opined that, based on the context of the incidents, the length Cerpa had been contacted over the years, and his admission of how long he had been associated with the gang, that Cerpa was a "well-respected" gang member and the "channel" or the "go-to person" in the gang.

As to Cerpa's codefendants, Detective Martin detailed eight prior incidents for Delvillar; nine prior incidents for Lopez; and six prior incidents for Rocha.

In a hypothetical based on the facts of this case, Detective Martin opined that this was a Norteño residential robbery, noting the robbers wore red rags to cover their faces and one victim heard someone yell "Norte."

Section 186.22, subdivision (b)(1)

Cerpa was charged with felony murder and two counts of robbery. Attached to the robbery counts were allegations that a principal personally discharged a firearm causing a death (§ 12022.7), and that the robberies were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Only the street-gang enhancement required the jury to determine the nature, activities, and affiliates of the Norteño gang.

Section 186.22, subdivision (b)(1), imposes an enhancement on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ...." "There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1) .... The first prong requires proof that the underlying felony was 'gang related,' that is, the defendant committed the charged offense 'for the benefit of, at the direction of, or in association with any criminal street gang.' [Citations.] The second prong 'requires that a defendant commit the gang-related felony "with the specific intent to promote, further, or assist in any criminal conduct by gang members."' [Citations.]" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948.)

Proof of the existence of a criminal street gang is a prerequisite to a section 186.22, subdivision (b)(1) enhancement. (See *People v. Lara* (2017) 9 Cal.App.5th 296, 327.)

> "'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]' [Citation.] 'A "pattern of criminal gang activity" is

> defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]' [Citation.]" (*Id.* at pp. 326–327; accord, § 186.22, subds. (e), (f).)

Committing a crime in concert with other known gang members is substantial evidence inferring that a defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412; accord *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Moreover, a "specific intent to *benefit* the gang is not required." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Instead, a specific intent to assist gang members in any criminal conduct is sufficient to satisfy section 186.22, subdivision (b). (*Morales, supra,* at p. 1198.)

Unlike section 186.22, subdivision (a), a substantive offense, section 186.22, subdivision (b)(1) does not require the prosecution to show that the defendant is an active or current member of the gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.) However, while "gang membership is not an element of the gang enhancement [citation], evidence of defendant's membership … [can] bolster[ ] the prosecution's theory that he acted with intent to benefit his gang, an element it was required to prove." (*Sanchez, supra,* 63 Cal.4th at pp. 698–699.)

To prove the elements of the gang enhancement, the prosecution may present expert testimony. (See, e.g., *People v. Franklin, supra,* 248 Cal.App.4th at p. 948; *People v. Williams* (2009) 170 Cal.App.4th 587, 609; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.)

Cerpa's Challenge

Cerpa does not contest Detective Martin's testimony concerning his gang-related tattoos, photographs of Cerpa and other gang members, the history and background of the

Norteños and their subsets, as well as the required two predicate offenses. What he does challenge is Detective Martin's testimony regarding prior incidents attributable to Cerpa, his codefendants and others connected with the case, incidents of which Detective Martin had no personal knowledge but instead garnered from police reports and FI cards.[6] Cerpa argues this hearsay testimony was used as the basis for Detective Martin's opinion that Cerpa, his codefendants, and Ramirez were gang members and, because the prosecution's theory was that Cerpa was a high-ranking gang member who aided and abetted by helping other ranking gang members plan the charged offense, the admission of the case-specific hearsay prejudiced both his conviction on the substantive offenses and the gang enhancement findings.

In *Sanchez,* the California Supreme Court noted that some of its own precedents had blurred the distinction between *case-specific* hearsay and hearsay sources from which experts frequently derived their knowledge. (*Sanchez, supra,* 63 Cal.4th at p. 678.) The court stressed the traditional hearsay rule that precludes expert witnesses "from relating *case-specific* facts about which the expert has no independent knowledge." (*Id.* at p. 676; see also pp. 679, 684, 686.)

Sanchez reversed jury findings on street gang enhancements because "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford* [*v. Washington* (2004) 541 U.S. 36 (*Crawford*)]. The error was not harmless beyond a reasonable doubt." (*Sanchez, supra,* 63 Cal.4th at pp. 670–671.) With respect to the hearsay rule, *Sanchez* "drew a distinction

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6 Cerpa contends Detective Martin testified to being a percipient witness to only one 2009 traffic stop involving codefendant Delvillar, and the search of Cerpa's home following the current offenses.

between 'an expert's testimony regarding his general knowledge in his field of expertise,' and 'case-specific facts about which the expert has no independent knowledge.' [Citation.] The former is not barred by the hearsay rule, even if it is 'technically hearsay,' while the latter is." (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 408.) Case-specific knowledge that is inadmissible testimonial hearsay includes "statements about a completed crime, made to an investigating officer by a nontestifying witness ... unless they are made in the context of an ongoing emergency ... or for some primary purpose other than preserving facts for use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 694.) Police reports were therefore testimonial, but the court in *Sanchez* "was unable to determine whether information about the defendant recorded on an FI card was testimonial because the circumstances of its creation were not clarified by the parties at trial." (*People v. Vega-Robles, supra*, 9 Cal.App.5th at p. 410.)

Respondent contends any error in the admission of case-specific hearsay by Detective Martin was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Sanchez*, *supra*, 63 Cal.4th at pp. 670–671, 698.) Cerpa disagrees, arguing the evidence against him was not strong.

We agree with respondent. Ample admissible evidence was introduced to prove each of the required elements; there is no likelihood that the admission of any improper evidence affected the verdict. While the gang enhancement itself does not require proof that Cerpa was a gang member (although his counsel in closing repeatedly acknowledged he was a gang member), the evidence here was overwhelming that Cerpa committed the crimes with known gang members. (See *People v. Albillar* (2010) 51 Cal.4th 47, 67–68; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1369–1370.) As noted previously, committing a crime in concert with other known gang members is substantial evidence inferring that a defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. (*People v. Miranda, supra,* 192 Cal.App.4th at p. 412; accord *People v. Villalobos, supra,* 145 Cal.App.4th at p. 322.)

The gang membership or association of Cerpa, his codefendants, and Ramirez was shown by a wealth of information other than inadmissible hearsay. Accomplices Becerra and Flores, as well as codefendant and accomplice Rocha, all testified that Cerpa was involved with the Norteño gang. Photographs of Cerpa's gang tattoos were admitted into evidence, as were pictures of the gang paraphernalia found in his bedroom. Rocha admitted his involvement with the Norteños, and photographs of his gang tattoos and the graffiti covering his school binder were admitted into evidence. Codefendant Virgen confirmed Rocha was in the gang. Codefendant Lopez was implicated by Becerra and Rocha as being a part of the gang. Photographs of Lopez's gang tattoos were admitted, and he was listed by name on the gang roster found in Cerpa's home. Becerra and Virgen's testimony implicated Delvillar as a gang member and photographs of Delvillar's gang tattoos were admitted. And finally, Ramirez was implicated as part of the gang by Flores, Becerra, and Rocha.

Nor do we agree that evidence of Cerpa's guilt was weak. We have discussed the substantial evidence of Cerpa's guilt in part I. of the discussion, *ante*. It is therefore unnecessary to repeat it here. We conclude beyond a reasonable doubt that introduction of Detective Martin's opinion that Cerpa, his codefendants, and Ramirez were gang members, although based in part on hearsay, was harmless.

IX. ENHANCEMENT INSTRUCTION

Cerpa contends the gang enhancement instruction given the jury was erroneous, eliminating a mental state element in violation of due process. We find no prejudicial error.

When discussing jury instructions, the trial court proposed changing the wording "the defendant" to "a defendant" on various instructions, as this case involved multiple defendants. A thorough discussion ensued and the parties were asked to respond to this proposed change; the prosecutor and all defense counsel agreed with the change,

including Cerpa's counsel. Because Cerpa's counsel did not object to the trial court's proposed wording and agreed to the modification, any error is waived. (*People v. Bolin* (1998) 18 Cal.4th 297, 326.)

In any event, any error was harmless under the standard set forth in *Chapman v. California, supra,* 386 U.S. at page 24.

Cerpa contends he was prejudiced by the trial court's use of the phrase "a defendant" in the instructions for the two enhancements: for benefitting a criminal street gang (CALCRIM No. 1401) and for personal discharge of a firearm causing death (CALCRIM No. 1402). He challenges the street gang enhancement instruction for "allow[ing] the jury to impose the enhancement on [Cerpa] if only a single co-defendant had the requisite mental state," but only challenges the preface to the firearm-enhancement instruction.

Regarding the gang enhancement, the instruction, CALCRIM No. 1401, in relevant part, as given, stated:

> "If you find a defendant guilty of the crimes as charged in Counts II and III, you must then decide whether, for each crimes, the People have proved the additional allegation that a defendant committed that crime for the benefit of, at the direction of, or on association with a criminal street gang. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.
>
> "To prove this allegation, the People must prove that:
>
> "Number 1, a defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang;
>
> "And two, a defendant had the specific intent to assist, further, or promote criminal conduct by gang members."

And as for the allegation that a principal discharged a firearm causing death, the trial court instructed, pursuant to CALCRIM No. 1402, that once the jury found that "a defendant" committed the robberies for the benefit of a criminal street gang, the jury "must then decide whether for each crime the People have proved the additional

allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death."

Again, section 186.22, subdivision (b)(1), imposes a gang enhancement on "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Cerpa argues that, because this enhancement requires evidence that a person acted for the benefit of a street gang and had the specific intent to promote or assist in criminal conduct by gang members, the instruction, as given, allowed the jury to impose the enhancement on a defendant even though that defendant did not act with the requisite state of mind. In other words, it could be imposed on the state of mind of a codefendant.

He also argues that the using the phrase "a defendant" in the preface to the CALCRIM No. 1402 firearm-enhancement instruction somehow "eliminated the mental state element of the enhancement." However, the firearm-enhancement instruction stated the elements without alteration:

> "Number 1, someone who was a principal in the crime personally discharged a firearm during the commission of the robbery;
>
> "Two, that person intended to discharge the firearm;
>
> "And three, that person's act caused the death of another person."

When determining the correctness of jury instructions, we consider the entire charge of the court, in light of the trial record. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 926.) "When a defendant claims an instruction was subject to erroneous interpretation by the jury, he must demonstrate a reasonable likelihood that the jury misconstrued or misapplied the instruction in the manner asserted. [Citation.]" (*Ibid.*) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez, supra,* 26 Cal.4th at p. 852.) We consider the arguments of counsel in assessing the

probable impact of a challenged instruction on the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

In *People v. Petznick* (2003) 114 Cal.App.4th 663 cited by Cerpa in support of his argument, the court held that it was error to give an instruction where the jury could have understood the phrase "a defendant" to refer to any of the four participants in a homicide, each tried separately, in which three special circumstances, including torture, were alleged. (*Id.* at pp. 685–687.) In *Petznick*, the court also found that use of the indefinite article was emphasized by the trial court both orally and in writing, that the jury demonstrated confusion on the issue of intent by questions concerning a conspiracy instruction, and that the error was prejudicial because it was not cured by argument or other instruction. (*Ibid.*)

Here, by contrast, any ambiguity or uncertainty was resolved by the other instructions and arguments of counsel. In the present case, the trial court instructed:

> "All defendants in this case are charged with the same crimes. You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately. If you cannot reach a verdict on all of the defendants or on any of the charges against any defendant, you must report your disagreement to the Court and you must return your verdict on any defendant or charge on which you had unanimously agreed." (CALCRIM No. 203.)

The trial court also instructed:

> "The crimes and other allegations charged in this case require proof of the union, or joint operation of act and wrongful intent. [¶] For you to find a person guilty of the crimes in this case, that person must not only intentionally commit the prohibited act, but must do so with a specific intent and mental state." (CALCRIM No. 251.)

These instructions made clear that the charges were to be considered separately against each defendant. In addition, the prosecutor did not argue to the contrary, but instead argued the evidence and criminal liability separately as to each defendant. In light of the instructions as a whole and the arguments of counsel, there is no reasonable

likelihood the jury would have understood CALCRIM Nos. 1401 and 1402, as given, to mean that if jurors found any of the codefendants guilty, they must also find Cerpa guilty of that crime as well. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1246, abrogated by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Espinoza* (1992) 3 Cal.4th 806, 823–824.)

X. VERDICT FORMS

Cerpa contends his conviction for count I, first degree murder, must be reduced to second degree murder because the jury failed to specify the degree on the verdict form. As we will explain, this argument is refuted by the entirety of the record.

Background

Section 187, subdivision (a), defines murder as "the unlawful killing of a human being … with malice aforethought."

Section 189, in turn, provides, as relevant here,

> "(a) All murder … that is committed in the perpetration of, or attempt to perpetrate … robbery … is murder in the first degree. [¶] (b) All other kinds of murders are of the second degree."

The indictment alleged Cerpa committed count 1, murder, as follows:

> "[O]n or about the 24th day of March, 2010, … did murder **JULIO JIMENEZ**, a human being. [¶] **SPECIAL ALLEGATION**: The murder was committed in the perpetration of a robbery, and all defendants are principals in the commission of said robbery pursuant to Penal Code Section 189."

The jury was instructed as to count I, in relevant part, as follows:

> "The defendants are charged in Count I with murder under a theory of felony murder. The defendants may be guilty of murder under a theory of felony murder even if another person did the act that resulted in the death. I will call the other person the perpetrator.
>
> "To prove that a defendant is guilty of first-degree murder under this theory, the People must prove that:
>
> "Number 1, the defendant aided and abetted the crime of robbery;

"Two, the defendant intended to aid and abet the perpetrator in committing the robbery;

"Three, if the defendant did not personally commit robbery, then the perpetrator, whom the defendant was aiding and abetting personally committed robbery;

"Four, while committing robbery, the perpetrator caused the death of another person;

"And five, there was a logical connection between the cause of death and the robbery. The connection between the cause of death and the robbery must involve more than just their occurrence at the same time and place.

"A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent."

For count 1, the jury received a single verdict form which was returned and stated:

"We, the Jury in the above entitled cause, find the defendant, JAIME CERPA, **GUILTY** of the offense of MURDER, violation of Section 187(a) of the California Penal Code, a felony, as charged in Count I of the Indictment.

"We further find the murder WAS committed in the perpetration of a Robbery.

"We further find the defendant WAS a principal in the commission of the Robbery."

Applicable Law and Analysis

Cerpa contends that, while the jury found him guilty of Count I, it never made a finding that his conviction was for first degree murder, and the offense must be reduced to second degree murder as a matter of law. We disagree.

Cerpa's argument is based on section 1157, which states:

"Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

However, as we will explain, under the circumstances of this case, "section 1157 does not apply because the defendant has not been 'convicted of a crime ... which is distinguished into degrees' within the meaning of that section. Thus, the conviction is not 'deemed to be of the lesser degree.'" (*People v. Mendoza* (2000) 23 Cal.4th 896, 900 (*Mendoza*).)

In *Mendoza,* like here, the defendant was prosecuted on a theory of felony murder. His defense was that he was not present at the murder scene and, as such, his attorney never requested instruction on malice aforethought or lesser degrees of criminal homicide than first degree felony murder. Accordingly, the trial court instructed Mendoza's jury only on first degree felony murder, and the jury thereafter found him "'guilty of the offense charged in Count I, a felony, to wit, murder in violation of Section 187(a)" and returned true findings as to the special circumstances that the "murder 'was committed by [the defendant] while [he] was engaged in the commission of the crime of robbery'" and "'in the commission of the crime of burglary in the second degree.'" (*Mendoza, supra,* 23 Cal.4th at pp. 903–904.)

On appeal, the California Supreme Court rejected a comparable challenge to the jury's verdict based upon the absence of an express finding of first degree murder. In doing so, the court specifically distinguished felony murder from malice-based forms of murder:

> "In California, the first degree felony-murder rule 'is a creature of statute.' [Citation.] When the prosecution establishes that a defendant killed while committing one of the felonies section 189 lists, 'by operation of the statute the killing is deemed to be first degree murder as a matter of law.' [Citations.] Thus, there are no degrees of such murders; as a matter of law, a conviction for a killing committed during a robbery or burglary can *only* be a conviction for first degree murder." (*Mendoza, supra,* 23 Cal.4th at p. 908.)

The court continued:

> "That such murders can only be of the first degree has several significant consequences at trial. Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the *only* guilty verdict a jury may return is first degree murder. [Citations.] Under these circumstances, a trial court 'is justified in withdrawing' the question of degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of first degree murder. [Citation.]" (*Mendoza, supra,* 23 Cal.4th at pp. 908–909.)

Thus, the California Supreme Court ultimately held in *Mendoza* that where, as in our case, "the trial court correctly instructs the jury only on first degree felony murder and to find the defendant either not guilty or guilty of first degree murder, section 1157 does not apply. Under these circumstances, as a matter of law, the *only* crime of which a defendant may be convicted is first degree murder, and the question of degree is not before the jury. As to the degree of the crime, there is simply no determination for the jury to make. Thus, a defendant convicted under these circumstances has not, under the plain and commonsense meaning of section 1157, been 'convicted of a crime ... which is distinguished into degrees.'" (*Mendoza, supra,* 23 Cal.4th at p. 910.)

Here, the jury received no instructions on second degree murder, alternate theories of first degree murder, of any other homicide crimes. The only type of murder the jury considered in this case was felony murder and "as a matter of law, a conviction for a killing committed during a robbery or burglary can *only* be a conviction for first degree murder." (*Mendoza, supra,* 23 Cal.4th at p. 908.) When the jury read the verdict form asking it to decide whether Cerpa was guilty "of the offense of MURDER, violation of Section 187(a) of the California Penal Code, a felony, as charged in Count I of the Indictment," the only kind of murder the jury could have considered was felony murder.

Nevertheless, Cerpa argues that "the guilty verdict only represents a finding that [Cerpa] was guilty of simple murder," and rendering a guilty verdict on felony murder required "separate factual findings that would elevate murder to first degree felony murder." However, as already discussed, the jury was never presented with the opportunity to consider any kind of murder except for felony murder. Nothing in the

record supports Cerpa's view that the jury believed its duty was to first find Cerpa guilty of second-degree murder and then "elevate" that verdict to felony murder. We reject his claim to the contrary.

XI. CUMULATIVE ERROR

Cerpa contends finally that the cumulative effect of all of the above errors deprived him of a fair trial. We have either rejected Cerpa's claims of error and/or found any errors, presumed or not, were not prejudicial. Viewed cumulatively, we find any errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

XII. SENATE BILL 620

In supplemental briefing, Cerpa contends, based on the Legislature's enactment of section 12022.53, subdivision (h) after he was sentenced, this matter should be remanded to the trial court to allow it to decide whether to exercise its discretion to either strike or dismiss the 25-year-to-life enhancement for the firearm allegations. We agree.

Background

Cerpa was convicted, as charged, with robbery of an inhabited dwelling (§ 212.5, subd. (a)) in count 2, and robbery of Vargas (§ 211) in count 3. As to the robberies, the jury found true the allegations that they were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); and that a principal in each of the robberies personally discharged a firearm causing the death of Jimenez (§ 12022.53, subds. (d) & (e)(1)).

At sentencing, the trial court imposed the following sentence on Cerpa: 25 years to life for the count 1 murder; four years for the count 2 residential robbery; and one year for the count 3 robbery. The court imposed a consecutive 25 years to life section 12022.53, subdivisions (d) and (e)(1) enhancement on both counts 2 and 3. The trial court imposed but stayed a 10-year gang enhancement as to both counts 2 and 3.

Senate Bill 620

As stated above, the firearm enhancements were pleaded and proved pursuant to section 12022.53, subdivisions (d) and (e)(1). At the time Cerpa was charged, convicted, and sentenced, section 12022.53 established mandatory sentence enhancements for persons convicted of specified felonies, who discharge a firearm in the commission of the offense. (§ 12022.53, subds. (b)–(e).) Subdivision (d) of section 12022.53 mandates a consecutive enhancement of 25 years to life for any person who personally and intentionally discharges a firearm causing great bodily injury or death in the commission of one of the specified felonies. Subdivision (e)(1) imposes vicarious liability on an aider or abettor who committed the specified offense for the benefit of, at the direction of, or in association with a criminal street gang. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

Thus, the trial court here was required to, and did, enhance Cerpa's sentence pursuant to section 12022.53, subdivisions (d) and (e)(1) by imposing a 25-year consecutive term appended to both counts 2 and 3. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128.)

After Cerpa was sentenced, but while this case was pending on appeal, the Legislature enacted Senate Bill 620 (Stats. 2017, ch. 682, §§ 1, 2.) As of January 1, 2018, subdivision (h) of section 12022.53 provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Relying primarily upon *People v. Francis* (1969) 71 Cal.2d 66 and *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), as well as multiple recent published decisions (see, e.g., *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091 and *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679), the People concede the foregoing amendment applies retroactively to appellants' case when the amendment went into effect. We accept the concession without further analysis and remand this matter for the limited purpose of

allowing the trial court to consider whether to exercise its discretion under section 12022.53, subdivision (h) to either strike or dismiss the firearm enhancement authorized by section 12022.53, subdivision (d) and (e)(1).

XIII. SENATE BILL 1437

In additional supplemental briefing, Cerpa argues he is now entitled to the ameliorative benefits of the recently enacted Senate Bill 1437. Senate Bill 1437 made statutory changes altering the definitions of malice and first and second degree murder. The legislation also established a procedure by which a defendant who has sustained a murder conviction that arguably rests on a felony murder or a natural and probable consequences theory of liability may petition the sentencing court to hear additional evidence and, if appropriate, vacate the murder conviction if inconsistent with now-governing law. Notwithstanding the enactment of this procedure for retroactive relief, Cerpa argues he should be able to avail himself of the ameliorative benefits of Senate Bill 1437 on direct appeal. We disagree, concluding the Legislature's enactment of the petitioning procedure evinces an intent to limit retroactive application of Senate Bill 1437. Cerpa may seek Senate Bill 1437 relief, but he must do so via the procedural avenue provided by the legislation, which will permit the trial court to take additional evidence that may bear on Cerpa's liability for murder.

Senate Bill 1437

On September 30, 2018, while Cerpa's appeal was pending, the Governor signed Senate Bill 1437. The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending sections 188 and 189, as well as by adding section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2–4.) Cerpa requested the opportunity to submit

supplemental briefing on the effect of Senate Bill 1437 and we received supplemental briefs from both sides.

Pertinent Provisions

Senate Bill 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill 1437 also adds the aforementioned section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory ... [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts ...." (§ 1170.95, subd. (a).)

An offender may file a petition under section 1170.95 where all three of the following conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)–(3).)

Pursuant to section 1170.95, subdivision (c), the petition shall include, among other things, a declaration by the petitioner stating he or she is eligible for relief based on

all three aforementioned requirements of subdivision (a). A trial court that receives a petition under section 1170.95 "shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) If the petitioner has made such a showing, the trial court "shall issue an order to show cause." (§ 1170.95, subd. (c).)

The trial court must then hold a hearing "to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1).) "The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner." (§ 1170.95, subd. (d)(2).) Significantly, if a hearing is held, "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) "[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (§ 1170.95, subd. (d)(3).) "If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges." (§ 1170.95, subd. (d)(3).)

Section 1170.95, subdivision (f) states: "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner."

Retroactivity of Senate Bill 1437

The information filed against Cerpa charged him with murder under section 187, subdivision (a). Among the instructions given to the jury were instructions that allowed the jury to convict defendant of first degree murder pursuant to either a felony murder theory or the natural and probable consequences doctrine, as both were defined prior to the effective date of Senate Bill 1437. Cerpa was convicted of first degree murder.

Cerpa contends Senate Bill 1437 applies retroactively to him, and asks that we reverse his conviction.[7] Relying on retroactivity principles espoused in *Estrada, supra,* 63 Cal.2d 740, Cerpa asserts he need not file a petition under section 1170.95 because his conviction is not yet final. Respondent, in contrast, argues Cerpa must proceed only by way of a petition pursuant to section 1170.95 and cannot circumvent that process by seeking retroactive relief in this appeal. We agree with respondent.

Our Supreme Court recently summarized the principles articulated in *Estrada, supra,* 63 Cal.2d 740: "'[A]n amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date' (*People v. Floyd* (2003) 31 Cal.4th 179, 184, citing *Estrada*, at p. 744), unless the enacting body 'clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent' (*People v. Nasalga* (1996) 12 Cal.4th 784, 793; see *Estrada*, at p. 747). This rule rests on an inference that when the Legislature has reduced the punishment for an offense, it has determined the

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[7] Cerpa argues there is insufficient evidence to establish guilt under the new felony murder rule, as he was not a major participant in the robbery who acted with reckless indifference to human life. As such, he argues he was guilty of nothing other than vicarious felony murder *simplicitor*, a theory of liability that has now been eliminated. He also argues that the prosecutor had the opportunity below to charge the special circumstance murder, but chose not to, and suggests this is because the evidence did not warrant it. We express no view on the sufficiency of the evidence, and note a prosecutor has broad discretion when selecting which offenses to charge. (*People v. Henson* (2018) 28 Cal.App.5th 490, 512, citing *People v. Birks* (1998) 19 Cal.4th 108, 134.)

'former penalty was too severe' (*Estrada,* at p. 745) and therefore 'must have intended that the new statute imposing the new lighter penalty ... should apply to every case to which it constitutionally could apply' (*ibid.*)." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600 (*DeHoyos*).)

Two recent California Supreme Court opinions in circumstances analogous to those here point the way to the proper resolution of whether Senate Bill 1437 should be given retroactive effect on direct appeal notwithstanding the bill's enactment of the section 1170.95 petitioning procedure.

In *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), our Supreme Court considered whether *Estrada's* holding compelled a conclusion that the Three Strikes Reform Act of 2012, commonly known as Proposition 36, applied retroactively to defendants whose judgments were not yet final. (*Conley, supra,* at pp. 655–656.) The defendant in *Conley* had been sentenced to an indeterminate term of 25 years to life under the Three Strikes law. Voters passed Proposition 36 while his appeal was pending (*Conley, supra,* at pp. 654–655), and the initiative reduced the penalty for some third strike offenders whose third strike was not a serious or violent felony (*id.* at p. 652). Proposition 36 also created a post-conviction procedure that allowed prisoners who were already serving indeterminate life terms to seek resentencing for offenses that, if committed after the act's effective date, would no longer support life terms. (§ 1170.126, subd. (b).)

The defendant in *Conley* argued he was entitled to rely on *Estrada's* retroactivity rule, which would enable him to seek Proposition 36 relief without complying with the initiative's petition procedure. (*Conley, supra,* 63 Cal.4th at pp. 654–655.) That procedure, among other things, gives a trial judge discretion to withhold Proposition 36 relief if the judge finds that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (*Conley, supra,* at pp. 654–655; § 1170.126, subd. (f).)

Our Supreme Court rejected Conley's argument and held the post-conviction procedure provided by section 1170.126 was the exclusive means by which those who had been sentenced before Proposition 36's effective date could seek relief under the new law. (*Conley, supra,* 63 Cal.4th at pp. 661–662.) The Court acknowledged the continuing vitality of the *Estrada* rule in the unremarkable case of an ameliorative statute silent on whether it applies retroactively, but the Supreme Court concluded the defendant in *Conley* was not entitled, on direct appeal, to invoke Proposition 36's changes to prior law for three principal reasons.

First, Proposition 36 was "not silent on the question of retroactivity" but instead "expressly addresse[d] the question in section 1170.126, the sole purpose of which is to extend the benefits of [Proposition 36] retroactively." (*Conley, supra,* 63 Cal.4th at p. 657.) In doing so, Proposition 36 did not distinguish between persons serving final sentences and those serving nonfinal sentences. (*Ibid.*)

Second, Proposition 36 made resentencing contingent on a court's evaluation of a defendant's dangerousness. Conferring an automatic entitlement to resentencing on defendants whose cases were still pending on direct appeal would not allow courts to conduct that inquiry, and the court found no basis to hold the electorate intended "for courts to bypass the public safety inquiry altogether in the case of defendants serving sentences that are not yet final." (*Conley, supra,* 63 Cal.4th at p. 659.)

Third, the changes in law worked by Proposition 36 not only reduced previously prescribed criminal penalties but also established "a new set of disqualifying factors that preclude a third strike defendant from receiving a second strike sentence," factors that the prosecution was required to plead and prove. (*Conley, supra,* 63 Cal.4th at p. 659.) Because Proposition 36 did not address the complexities involved in applying the pleading-and-proof requirements to previously sentenced defendants, the court concluded the electorate did not contemplate those provisions would apply to previously sentenced defendants. (*Conley, supra,* at pp. 660–661.) Rather, they intended such defendants to

seek relief under section 1170.126, which did not contain pleading-and-proof requirements.

Our Supreme Court reached a similar result in *DeHoyos, supra,* 4 Cal.5th 594, which presented the question of whether Proposition 47 ("the Safe Neighborhoods and Schools Act") applied retroactively to nonfinal cases on direct appeal. "Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies" and enacted a petitioning procedure similar to that enacted as part of Proposition 36. (*DeHoyos, supra,* at p. 597.) In *DeHoyos,* the court noted Proposition 47, like Proposition 36, was "an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contain[ed] a detailed set of provisions designed to extend the statute's benefits retroactively." (*DeHoyos, supra,* at p. 603.) Those provisions included a recall of sentence petitioning mechanism for individuals "serving a sentence" for a covered offense as of Proposition 47's effective date. (§ 1170.18, subd. (a).)

As it did in *Conley* when analyzing Proposition 36, the *DeHoyos* court found it significant that Proposition 47's recall of sentence petitioning mechanism drew "no express distinction between persons serving final sentences and those serving nonfinal sentences, instead entitling both categories of prisoners to petition courts for recall of sentence" and "expressly ma[king] resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest."' (*Conley*, [*supra,* 63 Cal.4th] at p. 658; see § 1170.18, subd. (b).)" (*DeHoyos, supra,* 4 Cal.5th at p. 603.) *DeHoyos* acknowledged Proposition 47 differed from Proposition 36 in that it did not "create new sentencing factors that the prosecution must 'plead[ ] and prove[ ]' (Pen. Code, § 1170.12, subd. (c)(2)(C)) to preclude a grant of leniency." (*DeHoyos, supra,* at p. 603.) The court explained, however, that other indicia of legislative intent, including

Proposition 47's broad statement of purpose, revealed the initiative's petitioning procedure was meant to be the exclusive avenue for retroactive relief for all previously sentenced defendants, whether or not their sentences were final. (*Ibid.*)

The analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here.

Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal.

The remainder of the procedure outlined in section 1170.95 underscores the legislative intent to require those who seek retroactive relief to proceed by way of that statutorily specified procedure. The statute requires a petitioner to submit a declaration stating he or she is eligible for relief based on the criteria in section 1170.95, subdivision (a). (§ 1170.95, subd. (b)(1)(A).) Where the prosecution does not stipulate to vacating the conviction and resentencing the petitioner, it has the opportunity to present new and additional evidence to demonstrate the petitioner is not entitled to resentencing. (§ 1170.95, subd. (d)(3).) The petitioner, too, has the opportunity to present new or additional evidence on his or her behalf. (§ 1170.95, subd. (d)(3).) Providing the parties with the opportunity to go beyond the original record in the petition process, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning

procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials. This, too, indicates the Legislature intended convicted persons to proceed via section 1170.95's resentencing process rather than avail themselves of Senate Bill 1437's ameliorative benefits on direct appeal.

Cerpa disagrees with this conclusion, arguing *Conley* and *DeHoyos* are distinguishable because the petitioning procedures enacted by Propositions 36 and 47 conditioned sentencing relief on a trial court finding that the defendant would not pose an unreasonable risk of danger if released, and section 1170.95 contains no such requirement. While Cerpa is correct that section 1170.95 does not require a dangerousness inquiry, neither *Conley* nor *DeHoyos* holds that inquiry was the indispensable statutory feature on which the result in those cases turned. To the contrary, *Conley* notes "[o]ur cases do not 'dictate to legislative drafters the forms in which laws must be written' to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require 'that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.'" (*Conley, supra,* 63 Cal.4th at pp. 656–657; see also *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 312 [explaining *Conley* held *Estrada's* inference of retroactivity was inapplicable because "the legislation contained its own retroactivity provision"].) Accordingly, we look not for specific procedural conditions, but for indicia of the Legislature's intent. Here, as we have already detailed, the other indications the Legislature intended to restrict individuals who have already been convicted to the petitioning procedure outlined in section 1170.95 are considerable.

Cerpa also contends section 1170.95, subdivision (f) supports his argument for direct appeal retroactivity because it states: "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner." The court in *Conley*

rejected a similar argument concerning an analogous provision included in the text of Proposition 36, reasoning that provision "contain[ed] no indication that automatic resentencing—as opposed to, for example, habeas corpus relief—ranks among the 'rights' the electorate sought to preserve." (*Conley, supra,* 63 Cal.4th at pp. 661–662.) We reach the same conclusion here, where there is no indication that reversal of a defendant's sentence on direct appeal, without compliance with the procedures outlined in section 1170.95, was among the "rights" the Legislature sought to preserve in enacting Senate Bill 1437.

In light of our conclusion that Cerpa must file a section 1170.95 petition in the trial court to seek retroactive relief under Senate Bill 1437, we express no view on whether he should be granted Senate Bill 1437 relief. That will be a question for the trial court in the first instance, if a section 1170.95 petition is filed.

DISPOSITION

We remand this matter for the limited purpose of allowing the trial court to consider whether to exercise its discretion under Penal Code section 12022.53, subdivision (h) to either strike or dismiss the firearm enhancements authorized by Penal Code section 12022.53, subdivision (d). In all other respects, we affirm.

_____
FRANSON, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
SNAUFFER, J.